

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision	)	MB Docket No. 07-51
of Video Services in Multiple Dwelling	)	
Units and Other Real Estate Developments	)	
	)	

**COMMENTS OF LENNAR CORPORATION**

Lennar Corporation (“Lennar”) hereby submits its opening comments in response to the Notice of Proposed Rulemaking in the above-captioned matter released March 27, 2007.<sup>1</sup>

**I. SUMMARY**

As one of the nation’s largest developers and builders of new, large-scale residential communities, Lennar has a strong interest in ensuring that the buyers of its homes have available the widest possible range of competing advanced broadband services, including multichannel video, broadband data, and other evolving new service offerings. The NPRM addresses the issue of whether the use of exclusive contracts for the provision of video services to multiple dwelling units (“MDUs”) or “other real estate developments” impedes competition in the multichannel video programming distributor (“MVPD”) marketplace or impedes accelerated broadband deployment. The critical question presented by the NPRM is whether regulatory intervention in this marketplace by the Commission will have the desired effect.

---

<sup>1</sup> Notice Of Proposed Rule Making, *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 07-32, MB Docket No. 07-51, released March 27, 2007 (“NPRM”).

The Commission's primary goal of promoting competition in the MVPD marketplace and accelerating broadband deployment is completely consonant with Lennar's interests. However, Lennar is not persuaded at this juncture that federal intervention in this marketplace is the best means to that end. The *ex partes* which prompted the NPRM assert wholly opposite conclusions. Certain incumbent telecommunications carriers have alleged that exclusive agreements impede their ability to compete, specifically for service to MDUs in metropolitan areas. The National Multi-Housing Council's *ex parte*, on the other hand, asserts that such contracts actually enhance competition by providing a means for competitive providers to receive some assurance that they will be able to recover the capital costs of installing their facilities. Lennar will examine the comments of the other participants in this proceeding and evaluate whether they present persuasive evidence one way or the other on this important question.

## **II. LENNAR'S BUSINESS AND INTEREST IN THIS PROCEEDING**

Lennar is one of the nation's largest homebuilders, actively engaged in construction of new communities in fourteen states. In fiscal 2006, Lennar sold over 49,500 new homes throughout the country. Its homebuilding operations include the construction and sale of single-family attached and detached homes, and to a lesser extent high rise condominium buildings, in communities targeted to first-time, move-up and active adult homebuyers. Lennar also is engaged in the purchase, development and sale of land to other residential home and commercial builders. Usually, Lennar projects are new large-scale residential developments in previously undeveloped areas, or

“greenfield” projects. Lennar’s Financial Services subsidiary also originated over \$10.5 billion in mortgages during fiscal 2006.

Lennar’s home buyer customers are generally aware of and desire the most current communications and entertainment services. The availability of advanced technologies in a new home can be an important factor in their home purchasing decision. In all cases, their move to a new home constitutes a time when acquiring such new services, perhaps for the first time, is both efficient and attractive. It is in Lennar’s own interest in the highly competitive home sales market to offer homes that make available the most advanced, highest quality, efficiently priced telecommunications and entertainment technologies and services. But Lennar’s focus is not on being a communications service provider; it relies on service providers to install the required infrastructure needed to make these services available to its new home buyers. As a result, Lennar’s views on the issues presented here are largely driven by those of the ultimate end users, i.e., to increase the prospect of vigorous competitive supply of multichannel video and other advanced communications services to Lennar’s new home developments.

Lennar is concerned that the Commission is considering an overly broad approach to regulation of MVPD exclusive agreements that may or may not be justified, and that may do more harm than good. This is particularly true in the current rapidly-changing regulatory environment where both cable and telecommunications service providers are being materially deregulated, and where there is already substantial state regulation of these agreements.

Before imposing new regulation of MVPD agreements the Commission should conclude unequivocally and based upon a full record that in all cases these exclusive contracts are harmful to video and advanced communications competition, and negatively affect accelerated broadband deployment. The Commission should also carefully consider whether centralized federal regulation is preferable to existing state regulation of these agreements that is presumably responsive to local conditions.

### **III. THE MVPD MARKETPLACE IS UNDERGOING A DRAMATIC TRANSITION CHARACTERIZED BY NASCENT COMPETITION, LARGELY BETWEEN A DUOPOLY OF INCUMBENTS, AND EROSION OF THEIR EXISTING OBLIGATIONS TO SERVE**

#### **A. Incumbents Possess Market Power in Adjacent Markets**

Lennar is not directly concerned with the alleged impact of exclusive contracts on incumbent cable and telecommunications companies.<sup>2</sup> In many locations throughout the United States, as recognized by the NPRM,<sup>3</sup> the primary competitors for the provision of MVPD services are incumbent CATV companies and incumbent telephone companies. Both of these entities have focused marketing efforts on providing integrated bundles of voice, data, and multichannel video services. Just as the incumbent telephone companies have begun to offer services traditionally available only from CATV companies, the CATV companies have now begun to offer voice and data services traditionally available only from telephone companies. Corporate advertising by each of these types of

---

<sup>2</sup> The *ex partes* of two incumbents dominant in the communications market in their respective telephone service territories helped influence the Commission to initiate this proceeding. SureWest is the dominant incumbent telephone service provider in the environs of Sacramento, California. Verizon has extensive historical monopoly franchises for telephone service throughout the nation. While the incumbent telephone companies have long espoused the merits of deregulation in the industry in which they hold dominant market shares, they seek regulatory intervention to limit the freedom of contract in this proceeding.

<sup>3</sup> NPRM, ¶ 6.

companies pervasively illustrates the importance of these bundles, the “triple play,”<sup>4</sup> in their marketing strategy.

Although an incumbent local exchange telephone company (“ILEC”) may be a “new entrant” in the provision of multichannel video services, it nevertheless retains its dominant market power in its traditional service categories. The same is true with respect to the incumbent CATV companies; they also retain their dominant market position with respect to their traditional multichannel video services. The Commission must recognize the ability of each of these incumbents to leverage their market power in their respective incumbent market to the adjacent market they now seek to enter, and the clear relationship of this power to the evaluation of exclusive MVPD agreements. Federal and state authorities have already provided incentives and removed regulatory disincentives for investment by these firms and freed them to compete, as exemplified by the publicly announced decisions of both AT&T and Verizon to invest billions of dollars to modernize their networks to provide broadband video and data services, and comparable efforts by CATV companies such as Comcast to enable their networks to provide broadband data and voice services. Both the CATV and telephone incumbents also possess large economies of scale and scope which mitigate their risk of under-recovery of new investment relative to other smaller and less entrenched competitive entrants. In evaluating the potential impact of exclusive contracts, the Commission cannot ignore the interrelationship of these adjacent, dominant market powers.

//

//

---

<sup>4</sup> Id.

## **B. The Obligation To Serve of Incumbent CATV Companies and ILECs Is Disappearing**

Despite retention of this market power, both the cable and telecommunications industries are undergoing a dramatic transition from regulated, exclusively franchised utilities to essentially unregulated competing service providers, prompted in no small measure by the advocacy of the incumbent providers themselves. This process is far closer to its conclusion than its beginning. As their rights to exclusive territory and service provisioning are reduced, there is a simultaneous erosion of their long-established obligations to serve.<sup>5</sup> For example, most historical cable franchises contained “build out” requirements that mandated construction of network extensions when a defined number of homes existed in an unserved portion of the franchise territory, but such requirements do not exist under the new statewide video franchise frameworks. As an example of a similar trend on the telephone side, recent Florida legislation removes “carrier of last resort” obligations from ILECs in certain circumstances where developers or homeowners’ associations have entered into bulk service agreements with competitive providers.<sup>6</sup> In addition, no regulatory obligation to serve applies to providers of voice telephone service using VOIP technology.

In these circumstances, Lennar is concerned that prohibiting the use of exclusive contracts for MVPD services may actually be harmful to competition, at least in specific

---

<sup>5</sup> As two examples, in 2006 California enacted the Digital Infrastructure and Video Competition Act of 2006, which allows telecommunications companies to receive a single State franchise from the Public Utilities Commission to deliver multichannel video services to homes and businesses, instead of having to apply for individual franchises from cities and counties. Cal. Pub. Util. Code, Div. 2.5, §§ 5800 et seq. This legislation also permits incumbent CATV companies to “disavow” their existing local franchise obligations when a competing State-franchised provider enters their franchise territory, and instead opt for a State-granted franchise under the new law with far fewer obligations attached. A similar law recently was adopted in Florida. See, Chapter 2007-29, Laws of Florida, Consumer Choice Act of 2007. These new statutes ease both entry into and exit from the relevant market and allow the franchisee to define its desired service territory.

<sup>6</sup> Florida Statutes, Section 364.025(6).

market circumstances or submarkets. This is particularly true with respect to competition between the cable and telephony incumbents, as well as other new potential competitive entrants, for provisioning greenfield developments, due to the high level of capital required to construct entirely new network facilities in such unserved territories.

Lennar has historically confronted a lack of available multichannel video suppliers willing to serve a new development on a schedule consistent with Lennar's construction and sale of homes. Though Lennar has no business interest in ongoing operation of cable or communications systems for its developments, it has in the past found it necessary to self-provision in the absence of available supplier options. As a result, at December 31, 2006, Lennar's CATV subsidiary, Strategic Technologies, Inc., had approximately 11,300 subscribers in California, Florida and Texas. This construction was required due to lack of a franchised provider in the location of the new community or scheduling inconsistencies between the CATV company's construction plan and Lennar's community development plan.

If the current deregulatory trend of CATV companies and incumbent telephone companies continues, the obligation to serve of both incumbents will be essentially eliminated. If exclusive contracts are made unavailable as a means of attracting investment to new developments, these new developments could become stranded islands of underdevelopment of multichannel video, broadband and other advanced communications, or be forced to agree to unreasonable terms and conditions to obtain the necessary infrastructure.<sup>7</sup> The Commission should analyze whether exclusive contracts may in fact provide a desirable option in the greenfield segment of this evolving

---

<sup>7</sup> For example, each incumbent would be inclined to restrict its investment if the other incumbent was also present, based on lower projected penetration rates. This scenario is very different than a decision to upgrade existing facilities already serving a built out community.

broadband and MVPD marketplace, and pay close attention to the impact on the public of efforts by incumbents to either abuse their dominant market position in an adjacent market or “push the envelope” in limiting their obligation to serve.

For example, in 2006, Lennar found it necessary, for the first time in its history, to file a complaint against a utility refusing to provide service to several of its new real estate developments in Florida. Bell South was refusing to provide basic voice telephone service to these developments unless Lennar disclosed to Bell South the terms and conditions of contracts that had been entered into for the provision of multichannel video services on a bulk basis to the homeowners’ associations in the developments. Lennar objected because the information was both confidential and not relevant to Bell South’s obligation to provide basic voice telephone service.<sup>8</sup> In the end, the matter was resolved by Bell South agreeing to restrict its demands for such data and agreeing to provide voice telephone service to the developments.

Had the party desiring such competitively-sensitive data been a new entrant, it would have had no market power to extract unreasonable terms, such as the demand for release of proprietary information from Lennar. However, because of Bell South’s dominant position in the local exchange market, its refusal to serve these developments presented a substantial potential risk to the developments.

This illustrates that proper analysis of the potential impact of exclusive arrangements, such as bulk service agreements with homeowner’s associations, cannot be conducted without evaluation of the use by incumbent service providers of dominant market power to enhance and transfer that market power to the markets they are newly

---

<sup>8</sup> See, *In the Matter of Complaint of Lennar Developers, Inc. Against BellSouth Telecommunications, Inc. for Failure to Provide Services in Accordance with Section 364.025(1), Florida Statutes*. Florida Public Service Commission Docket 060732-TL.



entering, as well as recognition of the important impact of the disappearing obligations to serve of ILECs and CATV companies on the actual presence of competitive services in new communities.

#### **IV. EXISTING STATE REGULATORY FRAMEWORKS REVIEW SOME, BUT NOT ALL, EXCLUSIVE AGREEMENTS**

In evaluating the need for Commission intervention with respect to exclusive MVPD agreements, this Commission should also take notice of existing state and local regulatory frameworks governing some, but not all, of these agreements. For example, in the State of California the Department of Real Estate reviews such agreements entered into by a homeowner's association while that homeowner's association is under the control of the developer and has established criteria by which such agreements are determined to be reasonable, including such terms as the duration of the agreement and the services covered.<sup>9</sup> A state review process also exists in the State of Florida.<sup>10</sup>

Before the Commission imposes restrictive federal regulation on a nationwide basis, it should establish a complete record of the extent of local regulation, whether local conditions may vary such that more localized regulation is preferable, and whether any overriding federal regulation is necessary.

#### **V. THE COMMISSION SHOULD DEVELOP AN ADEQUATE RECORD CONCERNING "OTHER REAL ESTATE DEVELOPMENTS"**

The discussion in the NPRM of the background of this proceeding makes it clear that its historical focus has been on the MDU environment. In these circumstances, even

---

<sup>9</sup> See, Sections 11000, et seq of the California Business and Professions Code, and the Department of Real Estate Regulations found in Sections 2792 of Title X of the California Code of Regulations.

<sup>10</sup> See, e.g., Chapters 718 and 720, Florida Statutes, establishing the powers of the Florida Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation, including the review of disclosures concerning, among other things, MVPD agreements.

though an ILEC or CATV company network may pass the property line of the MDU, that company might historically have been unable to access customers in the MDU due to restrictive conditions concerning the distribution facilities within the private property of the MDU. As noted in the NPRM, the Commission has taken several specific steps to ameliorate these conditions in the context of telecommunications services to commercial multiple tenant environments (“MTEs”), and more recently with respect to residential MTEs.<sup>11</sup>

However, the NPRM also makes several references to “other real estate developments” without defining them or excluding any potential development of real estate from the scope of the reference.<sup>12</sup> These references can clearly be read to apply to Lennar’s large greenfield and other residential developments. The factual circumstances in these developments, particularly greenfield developments, differ fundamentally from those in existing MDU environments.

Lennar’s communities are often new developments in previously undeveloped areas, where substantial investment is required to establish new communications, video and broadband infrastructure. They are thus readily distinguishable from the MDU situations the *ex partes* address and which have previously been subject to access regulation by the Commission. MDUs are most often, as in the case of those referenced in the *ex partes*, located in already developed metropolitan or suburban areas, where rights of way, equipment and facilities of incumbents already exist in locations close to the MDU. Lennar’s greenfield developments, in contrast, often require substantial investment by network service providers in rights of way, engineering, and construction

---

<sup>11</sup> See, NPRM, ¶ 3.

<sup>12</sup> NPRM, ¶¶ 5-7 and 9-12.

of new network facilities. Under these circumstances, exclusive contracts may be more critical to attract new investment, particularly in the absence of any obligation to serve based upon a CATV or telephone franchise.

Before taking any further regulatory action the Commission should better define “other real estate developments” and develop a full record to examine the potential impact on the availability of competing broadband networks and services in each of the numerous types of “other real estate developments” before imposing regulatory constraints on exclusive MVPD agreements.

## **VI. CONCLUSION**

Lennar will scrutinize the comments of the participants in this proceeding. Though Lennar shares the overarching goals of the Commission, it is not clear at this time that the Commission’s intervention in the MVPD marketplace to broadly regulate or constrain exclusive contracts in all types of real estate developments will promote competition in the MVPD market and accelerate broadband deployment.

Dated: June 14, 2007

A handwritten signature in black ink, appearing to read "James M. Tobin", with a long, sweeping horizontal line extending to the right.

James M. Tobin  
William C. Harrelson  
Tobin Law Group  
Two Embarcadero Center, Suite 1800  
San Francisco, California 94111  
[jim@tobinlaw.us](mailto:jim@tobinlaw.us)  
415-732-1700  
415-732-1703 (facsimile)

Attorneys for Lennar Corporation